

**U.S. Department of Labor**

Board of Alien Labor Certification Appeals  
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**Issue Date: 14 July 2003**

**BALCA Case No.: 2002-INA-149**  
**ETA Case No.: P2000-NJ-02457778**

*In the Matter of:*

**CATIVELOS CONSTRUCTION, INC.,**  
*Employer,*

*on behalf of*

**ELVIS ZAPATA,**  
*Alien.*

Appearance: Henry A. Tesoroni, Esq.  
Newark, New Jersey

Certifying Officer: Dolores DeHaan  
New York, New York

Before: Burke, Chapman and Vittone  
Administrative Law Judges

**DECISION AND ORDER**

**PER CURIAM.** This case arises from Employer's request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of alien labor certification for the position of "concrete block mason."<sup>1</sup> The CO denied the application and Employer requested review pursuant

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<sup>1</sup> Permanent alien labor certification is governed by Section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20. We base our decision on the record upon which the CO denied certification and Employer's request for review, as contained in the appeal file ("AF") and any written arguments. 20 C.F.R. §656.27(c).

to 20 C.F.R. §656.26.

## **STATEMENT OF THE CASE**

On December 22, 1997, Cativelos Construction, Inc. ("Employer") filed an application for labor certification to enable Elvis Zapata ("Alien") to fill the position of "concrete block mason." (AF 13). Three years of experience in the job offered were required.

Employer placed appropriate advertisements, requesting applicants to submit a resume or letter of experience. (AF 22). One U.S. applicant did so, listing ten years of experience. (AF 24). Employer was advised by the State of New Jersey Department of Labor that it was expected to contact and interview each applicant within two weeks of receipt of the resume. (AF 25) The Employer submitted a report indicating that the applicant submitted only a letter and did not submit a resume or a list of prior companies and positions held. (AF 27). Based on the letter, Employer found that the applicant did not have the required three years of experience.

The CO issued a Notice of Findings ("NOF") on November 10, 2001, proposing to deny certification on the grounds that the one U.S. applicant who had applied for the position had been rejected based on other than lawful job-related reasons. (AF 34). Specifically, the applicant had responded by letter which indicated more than three years of experience. Employer reported that because the applicant did not send a complete resume, he lacked the necessary experience, and thus, rejected him. The CO found no evidence that the Employer made any attempt to contact the applicant by telephone or by writing, *i.e.*, telephone logs, copy of receipt for certified mail, green return card signed by applicant, such as would demonstrate that Employer had exhausted all available avenues in his attempt to fill the position with a qualified U.S. worker. Employer was advised that rebuttal needed to include evidence of contact by telephone or mail, and further documentation of specific lawful job-related reasons for the rejection of this applicant. Employer was also advised that rebuttal to this issue must be addressed by it and not by its counsel.

Employer's counsel submitted rebuttal on December 14, 2001. (AF 35). Therein, it was

argued that the applicant submitted only a conclusory letter of experience. As the applicant did not take the time to perform the basic task of listing present and prior employers, he could not “be considered a serious applicant.”

A Final Determination was issued on January 10, 2002, denying certification. (AF 37). The CO pointed out that the Employer did not acknowledge the information supplied by his attorney, despite the fact that the rebuttal had to be addressed by the employer and not his counsel. The CO found that the applicant’s letter presented sufficient information which made it reasonably possible that the applicant was qualified for the position, and the letter reflected an address and telephone number where he could be reached. Employer’s failure to contact the applicant to further investigate his credentials was not consistent with good faith recruitment efforts. The CO determined that Employer had failed to document lawful job-related reasons for rejecting this applicant.

On February 8, 2002, Employer requested review of the denial of certification by the Board of Alien Labor Certification Appeals (“Board” or “BALCA”). (AF 58).

## **DISCUSSION**

In its Request for Review of Denial of Labor Certification Application, Employer argues that in an identical case it filed, wherein the same U.S. applicant submitted the same letter of experience to Employer and Employer submitted the same rebuttal, labor certification was granted. Therefore, Employer argues, the instant case should also be granted, because unlike the holding in *Tedmar’s Oak Factory*, 1989-INA-62 (Feb. 26, 1990), it is not the previous finding upon which it is relying, but rather it is relying upon the certifying officer’s prior evaluation of the same experience letter of this U.S. applicant. Contrary to Employer’s assertion, however, this Board is not bound by prior decisions of a Certifying Officer, regardless of which portion of the prior finding is similar to the case at hand. *Tedmar, supra.*; *Mary Ann Emmons*, 1994-INA-227 (May 25, 1995). Furthermore, this Board is an appellate body, and therefore “evidence first submitted with the request for review” should not be considered because the record may not be supplemented on appeal. *See Capriccio’s*

*Restaurant*, 1990-INA-480 (Jan. 7, 1992) Employer has attempted to do so by including for the first time, with its request for review, documents from an unrelated filing for labor certification. Furthermore, where an argument made after the FD is tantamount to an untimely attempt to rebut the NOF, the Board will not consider that argument. *Huron Aviation*, 1988-INA-431 (July 27, 1989). Such is the case here.

An employer who seeks to hire an alien for a job opening must demonstrate that it has first made a "good faith" effort to fill the position with a U.S. worker. *H.C. LaMarche Ent., Inc.*, 1987-INA-607 (Oct. 27, 1988). It is the employer who has the burden of production and persuasion on the issue of the lawful rejection of U.S. workers. *Cathay Carpet Mill, Inc.*, 1987-INA-161 (Dec. 7, 1988)(*en banc*). In the instant case, a U.S. applicant submitted a letter of experience, as requested in the job advertisement, which clearly suggested that he was qualified for the position at issue. He exceeded Employer's requirement of three years of experience, yet was rejected by Employer on the basis of that letter alone. Employer arbitrarily claims that this applicant was not qualified.

Labor certification is properly denied where the employer rejects a U.S. worker who meets the stated minimum requirements for the job. *Banque Francaise Du Commerce Exterieur*, 1993-INA-44 (Dec. 7, 1993). If an applicant clearly meets the minimum qualifications for the job he or she is considered qualified. *UPS*, 1990-INA-90 (Mar. 28, 1991). Such is the case here, and Employer has failed to establish that the applicant was not qualified, available, able or willing to accept the position as advertised. It has also failed to provide documentation of good faith attempts to contact this applicant. In sum, Employer has failed to provide a lawful job-related reason for rejecting this applicant. Based upon the facts herein, labor certification was properly denied, and the following order shall issue.

## **ORDER**

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

Entered at the direction of the panel by:

A

Todd R. Smyth  
Secretary to the Board  
of Alien Labor Certification Appeals

**NOTICE OF PETITION FOR REVIEW:** This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of Board decisions; or (2) when the proceeding involves a question of exceptional importance. Petitions for review must be filed with:

Chief Docket Clerk  
Office of Administrative Law Judges  
Board of Alien Labor Certification Appeals  
800 K Street, N.W.  
Suite 400 North  
Washington, D.C., 20001-8002.

Copies of the petition must also be accompanied by a written statement setting forth the date and manner of that service. The petition must specify the basis for requesting review by the full Board, with supporting authority, if any, and shall not exceed five double-spaced typed pages. Responses, if any, must be filed within ten days of service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of a petition the Board may order briefs.